Supreme Court, U.S.
FILED
APR 02 2004

No. 03-1393

In The
Supreme Court of the United States

NICHOLAS BREDIMUS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Congress has the power to enact a statute that punishes one who travels in foreign commerce merely because he has "the intention of committing an illegal or immoral act at the conclusion of the journey"?

Whether the Commerce Clause allows the jurisdictional component (whether mail, telephone, plane, train, or a specific substantial effect upon commerce) to serve, by itself, as the *actus reas* of the offense?

Whether 18 U.S.C. § 2423(b) exceeds the "outer limit" of the foreign commerce power bestowed upon Congress and violates the Fifth Amendment fundamental right to travel by criminalizing mere travel?

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JURISDICTION

The Fifth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291. This Court has certiorari jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cl. 3

The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject

for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. § 2423(a)

(a) Transportation with intent to engage in criminal sexual activity. – A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 5 years and not more than 30 years.

18 U.S.C. § 2423(b)

(b) Travel with intent to engage in illicit sexual conduct. – A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

STATEMENT OF THE CASE

Petitioner was indicted on June 4, 2002,[1] for one count of knowingly traveling in foreign commerce on or about November 2, 2001, for the purpose of engaging in a sexual act with a child under 18 years of age (in violation of 18 U.S.C. § 2423(b)) and one count of traveling in foreign commerce on or about November 2, 2001, with intent to promote sexually explicit conduct by minors for the purpose of producing visual depictions of such conduct (in violation of 18 U.S.C. §§ 2251A(b)(2)(A) and 2251A(c)(1)). 2R249-250.

On August 27, 2002, a formal plea agreement was reached wherein Petitioner pled guilty to a violation of 18 U.S.C. § 2423(b). 2R331. On the same date, the parties stipulated to the following facts:

> "1. On or about late October 2001, Nicholas Bredimus (Bredimus), a United States citizen, left his residence in Coppell, Texas in the Northern District of Texas, Dallas Division, to travel to Thailand after first stopping in Hong Kong and Tokyo.[2] In addition to business meetings which were scheduled, Bredimus intended to make videotapes and digital images of Thai children engaged in sexually explicit conduct while he was in Thailand.

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[1] This was a re-indictment. Petitioner originally was indicted on March 5, 2002, with six counts.

[2] Petitioner later testified that all three locations were on his itinerary when he left Dallas and that he was to visit each for different (legitimate) business reasons. 5R21-22.

> 2. Upon his arrival in Thailand, Bredimus contacted Pensri Suhongsa (Penari), and hired her to accompany him to Chiang Rai Province as a procurer and interpreter. On or about November 3, 2001, Bredimus and Pensri traveled to Mai Sao in the Chiang Rai Province of Northern Thailand and obtained two rooms at the Srisamoot Hotel. Bredimus asked Pensri to find young boys or girls who would come to the hotel for him to photograph.
>
> 3. On or about November 3, 2001, Bredimus videotaped himself engaged in sexually explicit conduct with a thirteen year old Thai boy at the Srisamoot Hotel, and took digital images of the boy engaged in sexually explicit conduct in violation of 18 U.S.C. § 2423(b)."

2R337-338. Petitioner expressly reserved, inter alia, the right to "any appeal based on the defendant's assertion that 18 U.S.C. § 2423(b) is unconstitutional." 2R334.

Sentencing was conducted on November 18, 2002. *See* 6R 1 *et seq*. All remaining counts in the original and superseding indictment were dismissed. 6R50; *see also* 2R350-354. Notice of appeal was timely filed (2R355-56) and appeal was made to the Fifth Circuit Court of Appeals. The Fifth Circuit affirmed Petitioner's conviction and sentence on November 26, 2003. *United States v. Bredimus*, 352 F.3d 200 (5th Cir. 2003). *See* Appendix A. Petitions for panel and *en banc* rehearing were denied on January 7, 2004. *See* Appendix B. This petition for writ of certiorari is timely filed by April 6, 2004.

The issues herein were first raised in Petitioner's motion to dismiss the indictment, filed on May 3, 2002, which asserted that Congress overstepped the bounds of

its Commerce Power when enacting the two statutes under which Petitioner was charged, and that the district court did not have jurisdiction over an extraterritorial offense not having an effect within the United States. *See* 1R113-122.

On May 17, 2002, the Government responded that both statutes were appropriately based in Congress' power to regulate activities affecting channels of interstate and foreign commerce. *See* 2R205-213. The Government noted that the constitutionality of 18 U.S.C. § 2423(b) had been upheld against arguments that the statute's enactment was beyond the commerce power, violated citizens' fundamental right to travel, and criminalized "mere thought." *Id.* The Government argued that § 2423(b) was not analytically distinguishable from 18 U.S.C. § 1958(a), the murder-for-hire statute which makes it illegal to travel in interstate commerce with the intent that a murder be committed for hire. *Id.*

On May 28, 2002, the district court held a motions hearing. *See* 4R at 53-66. Petitioner's counsel challenged the constitutionality of the statutes on their face, noting that as trial progressed the motion would be supplemented with "as applied" challenges. 4R55-57. Counsel asserted that the principal trial issue would be whether Petitioner had the illicit intent when he traveled in foreign commerce, noting that Petitioner traveled to Hong Kong and Tokyo before reaching Thailand, where the illegal acts with minors were alleged to have occurred. *Id.*

The court asked the Government to explain why it had jurisdiction over Petitioner's case. 4R57-58. The Government responded that Congress has the authority to regulate travel that is initiated in the United States which

affects the channels of foreign commerce. 4R58. The Government added that, although Petitioner may have had some legitimate business purposes for travel, it did not have to prove that Petitioner's sole purpose for travel was to commit the illegal acts.[3] *Id.* The Government took the position that the actual conduct in the foreign country was secondary to the Government's need to prove travel from the United States accompanied at that point in time by the illicit intent. Counsel for the Government opined, however, "I think there also has to be some action on the part of the individual in the foreign country." 4R59.[4]

The Government maintained that the issue of the time of intent formation did not affect whether the statute was constitutional on its face, asserting that the question of when Petitioner's illicit intent was formed would be an

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[3] The Government is still required to prove "dominant motive." *Mortensen v. United States*, 322 U.S. 369, 374 (1944) (holding that the intention "must be found to exist before the conclusion of the interstate journey and must be the dominant motive of such interstate movement"); *Forrest v. United States*, 363 F.2d 348, 349-50 (5th Cir. 1966) (holding that the "illicit purpose" may coexist with other purposes, but "must have been an efficient and compelling purpose"). Legitimate business was a dominant reason why Petitioner traveled to Thailand, and he was scheduled to attend business meetings in Bangkok a couple of days after the offense occurred. Arraignment and Motion Hearing, April 8, 2002, at 47-48.

[4] The Government again asserted, "My position would be that when he left this country in a channel of foreign commerce with the intent to sexually exploit children, he had committed that offense, *certainly when he acted out on that offense*." 4R62. The court followed up, "That gets back to my original question. What conduct is specifically being regulated by the statute then, the travel?" 4R63. The Government responded, "Travel is definitely an essential element of the offense. It would appear that it's a combination of travel and the criminal conduct that occurs as a result of that travel ("in a foreign nation")." 4R62.

evidentiary issue. 4R62. Petitioner's counsel noted that it was uncontested that Petitioner had traveled from Dallas to Hong Kong and Tokyo before arriving in Bangkok and, thus, that the statute would have to be broad enough to cover "what this individual thought as he was on an airplane in the United States five trips away." 4R64-65.

Petitioner and the Government now fundamentally disagree about the nature of the *conduct* necessarily regulated by the statute – whether the limitations imposed by the Commerce Clause and the First, Fifth, and Eighth Amendments require conduct (in addition to travel) to be an independent element of the statute (Petitioner) or whether any relevant conduct in addition to *travel* merely serves as circumstantial evidence of intent (Government).

The court ordered supplemental briefing on the following issues: (1) What conduct is specifically regulated by the statutes in question, specifically, 18 U.S.C. § 2423(b) and 2251A(b)(2)(A)? (2) How is the scope of foreign commerce different in policy and purpose from interstate commerce, if at all? If there was no distinction, the parties were to state the authority that supported this conclusion. (3) What are the parameters of foreign commerce? By this, the court directed the parties to set forth in detail any authority which defined, described or set the parameters of foreign commerce, including the legislative history of the two statutes specifically identified above. 2R247-248; 4R63, 65-66. On June 7, 2002, both parties filed responses to the court's order. 2R252-262; 2R263-286.

Petitioner replied that although 18 U.S.C. § 2423(b) is directed toward sexual *conduct* with minors, this conduct is *not* an element of the offense. The statute imposes no requirement of any culpable act whatsoever (not even an

attempt). 2R252 at 254 (citing *United States v. McInnis*, 601 F.2d 1319, 1326 (5th Cir. 1979) ("[T]he interstate travel in each case occurred after some significant and unlawful step had been taken toward the commission of the federal offense.")).

The Government affirmed that the statute would not require as an element that the defendant actually engaged in sexual contact with a minor at his destination,[5] asserting that the crime would be complete when the defendant travels with the requisite intent and purpose. 2R263 at 265. According to the Government, penalizing of "mere thought" and extraterritorial application of the statutes do not occur because the *mens rea* and "initiation of travel" occur in the United States. 2R263 at 264-265. The Government pointed to several statutes punishing interstate and foreign travel to commit sex crimes that do not necessarily require a completed sex act. 2R263 at 266.[6]

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[5] As noted by trial counsel, the legislative history supports a contrary understanding that the travel would be supported by an additional *foreign* offense. 2R252 at 254 n.2 (referring to the Congressional Budget Office assessment that the offense would be difficult to enforce because the illegal activity with the minor would occur outside the United States). Furthermore, the objective territorial jurisdiction principle may require that the *domestic effect* of the extraterritorial offense be considered like an additional element of Section 2423(b). *See United States v. Pizzarusso*, 388 F.2d 8, 9-10 (2d Cir. 1968) (describing the detrimental domestic effects as an "element of the offense"); *Strassheim v. Daily*, 221 U.S. 280, 284-85 (1911).

[6] The Government cited 18 U.S.C. §§ 2241(c), 2421, 2422(a) and (b), and 2423(a). Contrary to Section 2423(b), each of these statutes *does* contain at least one element requiring some proof of *conduct* in addition to the commerce jurisdictional element. *See infra*.

On the comparison of interstate and foreign commerce, Petitioner observed that there might be little difference between foreign and interstate commerce in terms of what Congress may regulate. 2R252 at 255-256. Congressional power is exclusive in foreign commerce, but constrained by the joint sovereignty of the states in interstate commerce. 2R252 at 256. Petitioner maintained that the exercise of foreign commerce power requires a nexus between the United States and the foreign nation which is at least commercial in nature and relates in some meaningful way to the culpable conduct. 2R252 at 257. Petitioner argued that Section 2423(b) regulated no statutorily defined culpable conduct, unless mere thought were a crime, and thus there could be no commerce nexus in relation to conduct. Petitioner concluded that the foreign commerce power could not be interpreted so broadly as to require or allow "a global criminal code for U.S. nationals." *Id.*

The Government asserted that Congress' foreign commerce power was broader than its interstate commerce power. 2R263 at 266. Contrary to the defense position, the Government argued that Congress could regulate exclusively extraterritorial behavior of United States citizens who were sex tourists. 2R263 at 267. The Government asserted that the nexus between a defendant and the United States for extraterritorial application of federal criminal laws was satisfied by the defendant's United States citizenship. *Id.* Otherwise, "foreign commerce" required "some form of contact with a foreign state." 2R263 at 271 (quoting *United States v. Montford*, 27 F.3d 137, 138 (5th Cir. 1994)).

On July 19, 2002, the district court issued its memorandum opinion and order on the Defendant's

Motion to Dismiss. The court concluded that Congress' authority to regulate foreign commerce was extremely broad and certainly broad enough to regulate non-economic activities that "affect, impede, or utilize channels of commerce." 2R289-306 at 292-293 (quoting *United States v. Cummings*, 281 F.3d 1046, 1048 (9th Cir. 2002)). The court further noted that Congress had the authority "to keep the channels of interstate commerce free from immoral or injurious uses." 2R292-293 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964) (quoting *Caminetti v. United States*, 242 U.S. 470, 491 (1917)). It held, therefore, that a statute criminalizing foreign travel when done for an illicit purpose would not impermissibly burden a person's right to travel. 2R289 at 294. The court concluded – contrary to *Caminetti* – that the offense only required the act of travel in foreign commerce (from within the United States to another country) for the purpose of committing a sexual act with a juvenile. 2R289 at 294-295. The crime was completed by the United States citizen defendant's exit from the United States motivated, at least in part, by the illicit purpose. *Id.* The Government only had to prove that the illicit intent was a dominant motive, not the sole motive, for travel. 2R289 at 298.

On appeal to the Fifth Circuit Court of Appeals, Petitioner argued that the district court lacked jurisdiction, because (1) 18 U.S.C. § 2423(b) exceeds congressional authority to regulate foreign commerce under the Commerce Clause; and (2) 18 U.S.C. § 2423(b) gives the district court jurisdiction only when the defendant's actions violating the statute have domestic effect. Petitioner argued that the factual basis for his guilty plea was insufficient because the district court lacked jurisdictional

facts under either the Commerce Clause or objective territorial jurisdiction rules. He also claimed that: (1) 18 U.S.C. § 2423(b) violates the Commerce Clause, Fifth Amendment due process clause, and Eighth Amendment right to avoid cruel and unusual punishment because it lacks an *actus reas*;[7] (2) 18 U.S.C. § 2423(b) violates the First Amendment right to freedom of thought by criminalizing mere thought;[8] and (3) 18 U.S.C. § 2423(b) violates the Fifth Amendment fundamental right to travel by criminalizing mere travel.[9]

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[7] *See, e.g., United States v. Ayala*, 35 F.3d 423, 426 (9th Cir. 1994) ("Criminal penalties may be inflicted only if the accused has committed some act . . . which society has an interest in preventing. . . . ").

[8] The First Amendment prevents the Government from imposing content restrictions on a citizen's private thought. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *see Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.").

[9] This Court has held that:

> The right to travel is a part of the "liberty" of which the citizen cannot be deprived without the due process of law under the Fifth Amendment. . . . Travel abroad, like travel within the country . . . may be close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.

Aptheker v. Secretary of State, 378 U.S. 500, 505-06 (1964) (quoting *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958)). Section 2423(b) is "susceptible of sweeping and improper application" because, perhaps unlike any other like federal criminal statute, the only *act* it punishes is the sheer act of *travel* itself.

ARGUMENT/REASONS FOR GRANTING THE PETITION

1. The court of appeals' decision upholding the constitutionality of 18 U.S.C. § 2423(b) conflicts with *Caminetti v. United States*, 242 U.S. 470 (1917).

The Fifth Circuit upheld the constitutionality of 18 U.S.C. § 2423(b), even though the statute does no more than create an offense based upon travel with accompanying criminal motive. The circuit decision, thus, directly conflicts with this Court's opinion in *Caminetti v. United States*, 242 U.S. 470, 491 (1917), that in order to pass Commerce Clause scrutiny, a federal statute must criminalize something more than mere interstate (or foreign) travel with "the intention of committing an illegal or immoral act at the conclusion of the journey."

This Court's directive that Congress lacks the "power to punish one who travels in interstate commerce merely because he has the intention of committing an illegal or immoral act" – when viewed in light of the *Caminetti* facts and statute (the White Slave Traffic Act of June 25, 1910; a.k.a. "Mann Act")[10] – demonstrates that § 2423(b) is

[10] The commerce clause limit expressed by the Court in *Caminetti* would prevent application of the Mann Act to a prostitute who moved on her own from state to state to barter her own body, because she merely would be moving within the channels of commerce with intent to commit a criminal act at her destinations. This highlights the constitutional infirmity of Section 2423(b), especially as applied to anyone such as Bredimus who, as stipulated, merely traveled with intent to commit a criminal act at his ultimate destination and presented no additional acts effectuating his criminal intent prior to or at the time the statutorily-defined crime was completed (the moment of departure from the territory of the United States).

unconstitutional. Unlike the structure of the Mann Act, Section 2423(b) requires no proof of preparatory acts prior to or at the time of completion of the offense by the defendant's travel. The Mann Act requires the defendant to be charged with full commission of the evil that is the object of Congress' concern: "transporting or causing to be transported, or [**at the very least**] aiding and assisting in the transportation for . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose. . . . " *Caminetti*, 242 U.S. at 488 n.1. This is precisely what § 2423(a) ***does*** [as modeled after the Mann Act][11] and § 2423(b) ***does not*** do. Congress succeeded in the first clause of Section 2423 and failed in the second to properly set up a nexus between regulated evil ***conduct*** (the commission of some act besides mere travel) and commerce (travel).

The failure of 18 U.S.C. § 2423(b) to be a valid exercise of Congress' commerce power is evidenced by its stark isolation among all the other related federal statutes that carefully require proof of additional criminal acts (prior to, during, or following interstate or foreign travel or the use of a facility of commerce). In all of the other statutes, consistent with *Caminetti*, Congress has carefully avoided creating an offense that consists only of pure thought (criminal intent) and the (constitutionally-protected) jurisdictional element:

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[11] 18 U.S.C. § 2423(a) criminalizes knowing transportation of an individual under the age of 18 in interstate or foreign commerce with intent that the individual engage in prostitution or any other criminal sexual activity. *See infra*.

The kidnapping statute requires actual transportation of the victim in interstate or foreign commerce. 18 U.S.C. § 1201;

The lottery statutes require actual distribution of lottery-related materials in interstate or foreign commerce. 18 U.S.C. § 1301ff;

The principal Mail Fraud statute requires actual introduction into the mail system of anything designed to support a scheme to defraud. 18 U.S.C. § 1341;

The Wire Fraud statute requires actual transmission by wire, radio, or television communication in interstate or foreign commerce things designed to support a scheme to defraud. 18 U.S.C. § 1343;

The Bank Fraud statute requires an actual "execut[ion]" or attempt to "execute" a scheme or artifice. 18 U.S.C. § 1344;

The obscenity statutes involve actual use of means of commerce to convey obscene, indecent, or profane materials. 18 U.S.C. §§ 1461, 1462, 1463, 1465, 1466, 1468, 1470;

The statute barring sex trafficking of children requires actual recruitment, enticement, harboring, transporting, provision, or obtaining of a minor for the purpose that that person will be forced, defrauded, or coerced into engaging in a commercial sex act, when such ***acts*** are in or affect interstate commerce. 18 U.S.C. § 1591. It also penalizes the receiving of anything of value resulting from such ***acts***. *Id.* at § 1591(a)(2);

The Hobbs Act requires proof of actual "robbery or extortion or attempts or conspir[acy] so to do, or commi[sion] or threat[s] of physical violence to

any person or property in furtherance of a plan or purpose to do anything in violation of this section. . . . " 18 U.S.C. § 1951;

The Travel Act requires proof of facts existing before the use of interstate or foreign commerce consisting of "proceeds of . . . unlawful activity," "further[ance] of unlawful activity (with violence)," or "promot[ion], manage[ment], establish[ment], carry[ing] on, or facilitat[ing] the promotion, management, establishment, or carrying on, of any unlawful activity . . . " 18 U.S.C. § 1952;

18 U.S.C. § 1953 requires actual use of the means of commerce to convey gambling equipment (in a way parallel to § 2423(a) and the Mann Act – transporting persons);

The money laundering statute naturally requires the "carrying on of a "specified unlawful activity," previously existing "proceeds of some form of unlawful activity," etc. 18 U.S.C. § 1956(a)(2);

18 U.S.C. § 1957 involves monetary transactions in previously existing criminally derived property;

The murder-for-hire statute requires, as aforementioned, evidence of acts constituting a previous criminal agreement. 18 U.S.C. § 1958;

The RICO statute criminalizes the actual investment of previously existing income derived from racketeering in the establishment or operation of any enterprise that is engaged in or affects interstate or foreign commerce. 18 U.S.C. § 1962(a);

The statute prohibiting travel in interstate or foreign commerce or use of the facilities of commerce with intent to commit or abet a riot

requires that an "overt act" supportive of riot be committed. 18 U.S.C. § 2101(a) and (b). Clause (b) of the statute provides that the jurisdictional nexus may be established through proof that the defendant (1) incited or abetted a riot, (2) traveled in interstate or foreign commerce prior to his overt acts in support of riot, and/or (3) used a facility of interstate or foreign commerce to communicate with or broadcast to any person or group of persons prior to his overt acts in support of riot. 18 U.S.C. § 2101(b);

The relevant provision in the aggravated sexual abuse statute prohibits "cross[ing] a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years . . . [**and**] knowingly engag[ing] in a sexual act with another person who has not attained the age of 12 years, or knowingly engag[ing] in a sexual act under [other enumerated] circumstances . . . or attempt[ing] to do so." 18 U.S.C. §§ 2241(c);

The first clause of the child sexual exploitation statute criminalizes sexually exploitative acts victimizing minors, if those acts also are related to interstate and foreign commerce:

> – employment, use, persuasion, inducement, enticement, or coercion of any minor to engage in any sexually explicit conduct for the purpose of producing a visual depiction of such conduct;
>
> – coercion of a minor to engage in or assist any other person to engage in any sexually explicit conduct for the purpose of producing a visual depiction of such conduct;
>
> – transportation of any minor in interstate or foreign commerce or in any Territory or

> possession of the United States with the intent that such minor engage in any sexually explicit conduct for the purpose of producing a visual depiction of such conduct.

18 U.S.C. § 2251(a). To meet the requirements of the offense: (1) the defendant must know that the visual depiction will be transported in interstate or foreign commerce or mailed, (2) the visual depiction has to have been made using materials mailed, shipped, or transported in interstate or foreign commerce by any means (including computer), or (3) the visual depiction actually has to have been transported in interstate or foreign commerce or mailed. The second and third clauses penalize related behavior that also goes way beyond the constitutionally protected categories of thought and travel. 18 U.S.C. § 2251(b) and (c);

The statute barring the buying and selling of children requires proof of complex criminal acts, penalizing persons with custody and control of children for transferring those children to persons whom they know will cause the children to be portrayed in sexually explicit acts with an end goal of producing visual depictions. 18 U.S.C. § 2251A(a). Persons who obtain custody of children under such circumstances equally are penalized. 18 U.S.C. § 2251A(b). The Commerce power is guarded by an additional provision which requires that the acts described in the first two subsections be done in conjunction with: (1) transport of the minor or the actor in interstate or foreign commerce; (2) [in the case of an offer] the offer is communicated or transported in interstate or foreign commerce by any means; or (3) the conduct takes place in a Territory or possession of the United States. 18 U.S.C. § 2251A(c);

18 U.S.C. § 2252 bars the actual knowing shipment or receipt of material involving the sexual exploitation of minors in interstate or foreign commerce by any means. 18 U.S.C. § 2252A has a similar structure;

The interstate domestic stalking statute requires the commission of a criminal act in addition to the travel by rendering criminal the actions of a person who travels in interstate or foreign commerce with intent to kill, injure, harass, or intimidate a spouse or intimate partner, and who, in the course of or as a result of such travel, [actually] commits or attempts to commit a crime of violence against the spouse or intimate partner. 18 U.S.C. § 2261(a)(1);

The interstate stalking statute similarly criminalizes the conduct of a person who travels in interstate or foreign commerce with the intent to kill, injure, harass, or intimidate another person, and in the course of or as a result of the travel, actually places that person in reasonable fear of the death or serious bodily injury of that person, a member of that person's family, or that person's spouse or intimate partner. 18 U.S.C. § 2261A(1). The second subsection of the statute criminalizes the same kind of behavior as conducted through the mails with equal actual result. *Id.* at (2);

The interstate violation of protection order statute criminalizes the actions of a person who travels in interstate or foreign commerce with intent to engage in conduct violating the portion of a protection order prohibiting violence, threats, or harassment, contact or communication with, or physical proximity to, another person, or that would violate such portion of a protection order in the jurisdiction in which the order was issued,

and "*subsequently engages in such conduct.*" 18 U.S.C. § 2262(a)(1) (emphasis added).

18 U.S.C. §§ 2312 through 2321 criminalize acts constituting transportation in or transference through interstate and foreign commerce of such things as stolen vehicles, other stolen goods, stolen livestock, counterfeit labels, unauthorized sound recordings and videos of live music performances, counterfeit goods or services, and motor vehicles or motor vehicle parts;

18 U.S.C. § 2325 criminalizes certain kinds of telemarketing conducted by interstate phone call;

18 U.S.C. § 2340A, interestingly, criminalizes torture committed outside the United States by a United States citizen or an offender of any nationality if the offender is found within the United States. The statute relies upon the nationality principle to create jurisdiction over an offense occurring wholly without the United States. Such is appropriate for a crime like torture, which has *jus cogens* status, and therefore universal jurisdiction under international law;

The Mann Act, as has been noted, criminalizes the act of "knowingly transport[ing] any individual in interstate or foreign commerce . . . with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so." 18 U.S.C. § 2421. The next section criminalizes the persuasion, inducement, enticement, or coercion of any individual to travel in interstate or foreign commerce to undertake the same undesirable acts, and the use of the mails or facilities of commerce to accomplish the same. 18 U.S.C.

> § 2422(a) and (b). Section 2423 (subsection b), of course, is the statute at issue in this case. Section 2425 also criminalizes the use of the mail, facilities, or means of interstate or foreign commerce to transmit information about someone under age 16 with intent to entice, encourage, offer, or solicit any person to engage in illegal sexual activity.

This Court should grant review and hold that Petitioner's conviction and sentence under Section 2423(b) are void, in violation of the Constitution, because Congress overreached its commerce power in creating § 2423(b) *without the element of conduct* that renders every like statute constitutional. In every one of the federal statutes that should bear the same kind of Commerce Clause scrutiny as § 2423(b),[12] Congress has been careful to criminalize certain acts in addition to or along with the act of travel or use of a facility of commerce. These acts can occur prior to, during, or after the travel, where travel provides the jurisdictional element. But they must be present if the statute is not to become a threat to cherished rights to thought and travel.

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[12] Petitioner has conducted a thorough search for the relevant statutes that would require a nexus between the evil Congress addresses and commerce. Given that there are so many federal statutes, the result of the search herein is not exhaustive. Petitioner has not found one statute that, like Section 2423(b), fails to present elements consisting of more than thought and use of a means of commerce.

2. The court of appeals' decision upholding the constitutionality of 18 U.S.C. § 2423(b) conflicts with *United States v. Morrison*, 529 U.S. 598, 608 (2000), and *United States v. Lopez*, 514 U.S. 549, 556-67 (1995).

Congress overstepped even its "broader authority"[13] under the foreign commerce power by criminalizing foreign travel with an immoral intent or purpose in Section 2423(b), while requiring no proof of additional acts that would establish a nexus between commerce and the activity Congress sought to regulate. Section 2423(b), unlike any other statute of which Bredimus is aware, opens the door to unlimited Congressional assertion of general police power to regulate any activity of citizens outside the territory of the United States by criminalizing their departure with the formula:

CRIME = TRAVEL + INTENT TO COMMIT "X"
(fill in the blank)

As broad as the foreign commerce power may be, it cannot involve exercise of such unlimited police power without eliminating the purpose of the Commerce Clause itself. However *Lopez* and *Morrison* may be distinguished in relation to the categories of activity that Congress may regulate, they nevertheless mandate that even Congress' foreign commerce power has "outer limits" which may not be transcended. *Bredimus*, 352 F.3d at 205 (App. 8-9)

[13] The Fifth Circuit asserts that "Congress' [broader] authority to regulate foreign commerce" requires that the courts' "deference accorded to Congress" be "even more forcefully" applied in foreign commerce cases. *Bredimus*, 352 F.3d at 208 (App. 14).

(citing *United States v. Lopez*, 514 U.S. 549, 556-67 (1995); *United States v. Morrison*, 529 U.S. 598, 608 (2000)).

As recognized by *Caminetti*, the circuit courts' removal of almost any restraint on Congress to criminalize the *very use of the* "channels" of commerce overruns the limits of the Commerce Clause, endowing Congress with an inappropriate general police power. The encroachment of a statute like 18 U.S.C. § 2423(b) on First, Fifth, and Eighth Amendment rights should be viewed as a warning sign that the limits of the Commerce Clause also have been reached. Since travel is constitutionally protected, it should not be possible (under normal circumstances when travel is not flight from an offense and no independent probable cause exists to arrest the traveler) for a crime to be defined as intent plus travel (intent/act). The question more broadly presented is whether the commerce power allows the jurisdictional component (whether mail, telephone, plane, train, or a specific substantial effect upon commerce) to serve, by itself, as the *actus reas* of the offense. It should not. In every case – no matter whether it may otherwise be described as a channels, instruments, or substantial effect case – there has to be some use of the medium of commerce to commit an offense (an *additional act* that Congress wishes to prevent). *Bredimus*, 352 F.3d at 205 (App. 8) (quoting *Morrison*, 529 U.S. at 608) (noting that the Commerce Clause regulates *conduct*); *see also United States v. Dellinger*, 472 F.2d 340, 358-59 (7th Cir. 1972).[14]

[14] The Seventh Circuit observed, "There would be most serious doubt whether an individual's travel with intent to do something inimical to the interests of the community, but without any step other

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3. The court of appeals' decision upholding the constitutionality of 18 U.S.C. § 2423(b) conflicts with *United States v. Han*, 230 F.3d 560 (2d Cir. 2000).

In *United States v. Han*, the Second Circuit upheld the constitutionality of Section 2423(b) as applied to Han precisely because there was plenty of evidence that Han had committed all sorts of preparatory acts[15] in support of his intent to cross state lines to have sexual intimacy with a 13-year-old:

> The statute, as applied to Han, does not criminalize "mere thought." ***Han engaged in acts beyond mere thinking, evidenced by his telephonic communications in which he developed a plan and articulated a purpose to cross interstate lines to engage in sexual acts with a thirteen-year-old.*** Han clearly formulated this plan *before* he crossed the state border and manifested the prohibited intent by

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than the individual travel being taken to effect the intent, could be made an offense." *Dellinger*, 472 F.2d at 358-59. In support of this assertion, the Court cited the Mann Act, which is construed in *Caminetti*, as requiring transportation by the defendant of a woman or girl, as well as the specified intent. *Id.* at 358 n.19. The Court also referred to 18 U.S.C. § 1952 as "requir[ing] not only travel by a defendant with a specified intent, but also fulfillment or an attempt to fulfill such intent."

[15] Han's case is almost overly rich in preparatory acts. He "engaged in sexual internet chat conversations with a police officer posing as a 13-year-old "girl"; obtained a number from the "girl" so he could call her; instructed the "girl" how to masturbate; told the "girl" he would visit her and described what he would do sexually; set a specific date to meet the "girl" at a school park; called the "girl" several times to confirm the plan; drove on the scheduled date from New Jersey to the park in New York; and was arrested. *Han*, 230 F.3d at 563.

> doing so and by going to the arranged meeting spot."

United States v. Han, 230 F.3d 560, 563 (2d Cir. 2000) (emphasis added); *United States v. Brockdorff*, 992 F. Supp. 22, 25 (D. D.C. 1997) (registering "constitutional concerns" with Section 2423(b), based upon its lack of any necessary act in addition to travel). Because Han had engaged in "acts beyond mere thinking" ***before or by the time that*** he traveled across the state border, the Second Circuit upheld the constitutionality of the statute as applied. *Id* (noting "Han's 'mere thought' argument relies on the premise that he did not ***take steps*** sufficient to elevate his thoughts to an intention to commit the charged sexual acts with an underaged female.") (emphasis added). Petitioner's stipulated facts are ***devoid*** of any such acts supporting a purpose to use the channels or instrumentalities of commerce to effectuate the evil Congress wanted to prevent in Section 2423(b). In Petitioner's case, unlike Han's, no nexus is formed between the travel and the ultimate offense, because there is no evidence that Petitioner's mental state at the time of travel was more than a mere thought of "future crime."

Satisfied with the evidence of preparatory acts by Han, the Second Circuit held that Section 2423(b) was constitutional, as applied, even though it fell into the mere TRAVEL + INTENT formula, in contrast to the TRAVEL + INTENT + CONDUCT formula followed by statutes the Court deemed similar. *Han*, 230 F.3d at 562-63 (citing *United States v. Von Foelkel*, 136 F.3d 339 (2d Cir. 1998); *United States v. Gluzman*, 154 F.3d 49 (2d Cir. 1998)). The Court contrasted the statutes as follows:

> The statutes in *Gluzman* and *Von Foelkel* are distinguishable from § 2423(b) in that § 2261(a)(1)

> and § 2262(a)(1) require *both the crossing of state borders and an unlawful act thereafter* – whereas § 2423(b) criminalizes crossing state lines with a criminal intent, without requiring commitment of a further criminal act.

Id. at 563.

The Fifth Circuit acknowledged the problematic lack of any required "commitment of any further criminal act" in Section 2423(b), in contrast to Sections 2261 and 2262 (and implicitly numerous – if not *all* – other statutes criminalizing *conduct* under the commerce power). *Bredimus*, 352 F.3d at 207 (App. 13). But it sought refuge from the constitutional difficulty by analogizing Section 2423(b) to 18 U.S.C. § 1958, the murder-for-hire statute. *Id.* The comparison fails, however, for the precise reason that the murder-for-hire statute, unlike Section 2423(b), requires the commission of an act additional to travel: an agreement as to remuneration. 18 U.S.C. § 1958 criminalizes "travel[] in . . . interstate or foreign commerce . . . with intent that a murder be committed . . . *as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value. . . .* ") (emphasis added).[16]

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[16] *See Bredimus*, 352 F.3d at 207 (App. 13-14) (citing *United States v. Delpit*, 94 F.3d 1134, 1149 (8th Cir. 1996); *United States v. Degan*, 229 F.3d 553, 556 (6th Cir. 2000)) (erroneously stating that *Degan* addresses Section 2423(b) instead of Section 1958). The manner in which the *Delpit* Court describes murder-for-hire resembles the crime in Section 2423(b): "Once the interstate-commerce facility is used with the required intent the crime is complete. One who travels or causes another to travel in interstate commerce with the necessary murderous intent need not do anything else to violate the statute. . . . [T]he

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The Fifth Circuit also sought refuge from the problem identified in *Han* in Petitioner's guilty plea. *Bredimus*, 352 F.3d at 209 (App. 17). However, the fact that Petitioner pled guilty does not cure the constitutional problem with the statute as it is applied to him. The statute is defective for not having an *actus reas* element in addition to a "jurisdictional act." The guilty plea might have cured this problem, if Petitioner had stipulated to any preparatory acts of the sort found in *Han*, but he did not. He only admitted to harboring – at the time of his departure from the United States – an "inten[t] to make videotapes and digital images of Thai children engaged in sexually explicit conduct while he was in Thailand." The Fifth Circuit, in fact, concedes that Petitioner only pled guilty to the "requisite intent," and that the record is devoid of "any evidence of preparatory acts committed by him prior to his departure from Dallas to the Far East." *Id.*

CONCLUSION

In the futuristic movie thriller *Minority Report*, directed by Steven Spielberg and starring Tom Cruise, police in Washington, D.C., utilize a nearly flawless

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defendant can violate § 1958(a) without actually hurting or killing anyone." *Delpit*, 94 F.3d at 1149-50. However, Section 1958(a) also requires proof of acts [related to the evil to be prevented] undertaken prior to the travel. The constitutional problem with Section 2423(b), in contrast, is that it does not require such proof and allows indictment and conviction for pure thought and no preparation [no acts] prior to the travel that must form the jurisdictional element. This makes the travel not only the jurisdictional element but [impermissibly in relation to the Fifth Amendment right to travel] the solitary criminal act as well.

system that predicts future violent offenses shortly before they are destined to happen. This enables the authorities to swoop in and arrest the "perpetrators" during the time that they are forming a criminal intent but before they have committed the assaultive act. In the scene that reveals how the system works, a cuckolded husband is viewed gradually forming the intent to assault his dallying wife and lover with a knife. Following the advancing steps of the husband on a monitor, the police are desperate to find his actual location and stop the offense before it happens. They intervene just as the husband is about to strike and immediately send him off to a "prison" from which it appears that few return.

In the Second Circuit case, the defendant, Han, undertook preparatory acts that illustrated his intent to use the means of commerce to commit a sexual act with a person under 18. This eliminated the Second Circuit's concern over whether he might be convicted of a "thought" crime. *Han*, 230 F.3d at 563 (finding that, due to the evidence of Han's preparatory acts, it was unnecessary to decide whether "a mere thought of engaging in a sexual act with [a minor], where coupled with crossing a state line, constitutes a prohibited act" [or] "passes constitutional muster"); *Bredimus*, 352 F.3d at 209 n.11 (App. 17). Had future police like those in *Minority Report* been watching (as in fact the real police were), they could have stopped Han at the point in which he crossed the state line with no worry as to whether he was undertaking the activity Congress is permitted to regulate – using the channels or instrumentalities of commerce for immoral and injurious purposes. *Caminetti*, 242 U.S. at 491. On the other hand, had the future police been watching Petitioner, they would have had no clue of any criminal activity, past, present, or

future. On the facts as stipulated and admitted, Petitioner's actions would not yet have tripped their hypersensitive monitor.

The dramatic tension in *Minority Report* revolves around the question whether it ever could be just to convict and punish someone for a "future crime,"[17] if total confidence could be had in the means whereby the authorities were able to perceive the crime in advance, and if there was total certainty, as well, that but for the authorities' intervention, the accused would commit the offense. The same tension exists within Section 2423(b), which does not contain any provision requiring proof of preparation toward or achievement of the evil Congress intends to prevent (the "future crime"). The crime as defined by Congress is complete the moment the accused travels across the state or international boundary. But – at that point in time – is it a really crime? Perhaps so when significant criminal preparation attends the otherwise constitutionally protected thought and travel (as in *Han*) (despite the lack of a statutory provision requiring at least some sign of preparation). The Commerce Clause, however, should prevent a reading of the statute that supports charging and convicting a defendant like Petitioner, whose lack of preparatory acts demonstrates no concrete link to commerce.

Congress protects the "channels" and "instrumentalities" of commerce from abuse when it criminalizes ***actions***

[17] Indeed, this precise question, minus the issue of crime detection, seems to be raised and answered in the negative by this Court in *Caminetti*.

using commercial media to carry out crimes. Thus, use of the phones, wires, e-mail, shipping, trains, and planes is not privileged from Congressional regulation when these things are used in conjunction with evil acts Congress wishes to prevent. The relationship of these channels or facilities to the specific evil(s) against which the statute is aligned must be more than happenstance or incidental.[18] The mere thought of an offense, or desire to commit an offense, which has not been accompanied by evidence of *any act* facilitating the evil – e.g., speech aimed at facilitating a crime [hypothetically in this instance, an intrastate phone call to someone who informs the defendant of procurers in Thailand], the packing of sex-gadgets or a special kind of camera before a trip – should not allow the *constitutionally protected* travel jurisdictional element, by happenstance, to be turned into the *actus reas* of a crime.[19]

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[18] *See Rewis v. United States*, 401 U.S. 808, 812-13 (1971) (holding that jurisdiction could not be created under the Travel Act by geographical events which occurred through "happenstance"); *see also United States v. Presley*, 478 F.2d 163, 168 (5th Cir. 1973) (reversing district court's denial of motions to withdraw nolo contendere pleas on finding that facts had not been developed regarding the "extent and significance of the crossing of state lines to the furtherance of the operations of [an] illegal gambling casino"); *United States v. Gooding*, 473 F.2d 425, 427-28 (5th Cir. 1973) ("The Travel Act does not proscribe all interstate travel which may incidentally lead to a furthering of unlawful activity.") (citing *United States v. Hawthorne*, 356 F.2d 740 (4th Cir. 1966)).

[19] Travel undertaken without any other significant *acts related to the evil Congress wishes to prevent* also is like an international phone call between erstwhile conspirators wherein nothing about the object of the conspiracy is mentioned. Interstate or international phone calls – accompanied by an unvocalized intent (thoughts related to an existing conspiracy) – cannot be criminalized. *See United States v. Archer*, 486 F.2d 670,

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Surely, if the sexual conduct which Congress sought to proscribe had not occurred (as stipulated) in Thailand, no prosecution would have been brought against Petitioner's constitutionally protected thoughts about committing the offense or travel to Thailand (following upon his travel to other places). This Court should grant review because, if it does not, the ongoing vitality of anomalous 18 U.S.C. § 2423(b) – a solitary federal crime proscribing ***no conduct*** other than that which meets a constitutionally protected jurisdictional element – will erode and undermine Commerce Clause limits on the powers of the Executive and Congress to criminalize citizens' behavior.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Court grant his petition for writ of certiorari.

Respectfully submitted,

DAVID L. BOTSFORD
Counsel of Record
DANIEL SHEEHAN
WALTER C. LONG

683 (2d Cir. 1973) (finding no nexus even when a defendant's receipt of the relevant phone call from Paris, France, was expected by him).

APPENDIX A

352 F.3d 200

United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Nicholas BREDIMUS, Defendant-Appellant.

No. 02-11307.

Nov. 26, 2003.

Linda Marie Dedman (argued), Dallas, TX, for Plaintiff-Appellee.

David L. Botsford (argued), Law Office of David L. Botsford, Austin, TX, Daniel J. Sheehan, Jr., Daniel Sheehan & Associates, Dallas, TX, for Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas.

Before GARWOOD, JONES and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

Appellant Nicholas Bredimus ("Bredimus") conditionally pled guilty, expressly reserving his right to appeal, to the charge of knowingly and willfully traveling in foreign commerce for the purpose of engaging in a sexual act with a person under 18 years of age in violation of 18 U.S.C. § 2423(b). On appeal, he challenges the sufficiency of the factual basis for the guilty plea, arguing that the statute of conviction is an invalid exercise of Congressional authority under the Commerce Clause and it unconstitutionally punishes mere preparation, mere thought, and mere travel. He also contends that the district court lacked

jurisdiction to adjudicate the charge on the grounds that the offense lacked a domestic effect as required by the statute of conviction. For the following reasons, we affirm the judgment of the district court.

I. *FACTUAL AND PROCEDURAL BACKGROUND*

The following facts are not in dispute. In October 2001, Bredimus, a United States citizen, left his residence in Coppell, Texas to travel to Thailand after first stopping in Hong Kong and Tokyo. In addition to attending scheduled business meetings, while in Thailand Bredimus intended to make videotapes and digital images of Thai children engaged in sexually explicit conduct.

Upon arriving in Thailand, Bredimus contacted Pensri Suhongsa ("Suhongsa"), and hired her to accompany him to Chiang Rai Province as a procurer and interpreter. On November 3, 2001, Bredimus and Suhongsa traveled to Mai Sao in the Chiang Rai Province of Northern Thailand and obtained two rooms at the Srisamoot Hotel. Bredimus asked Suhongsa to find young boys or girls who would come to the hotel for him to photograph. That same day, Bredimus videotaped himself engaged in sexually explicit conduct with a thirteen-year-old Thai boy at the Srisamoot Hotel, and took digital images of the boy engaged in sexually explicit conduct.

Bredimus was indicted on March 5, 2002, in a six count indictment.[1] On June 4, 2002, a federal grand jury

[1] The original six count indictment of the appellant returned by a federal grand jury included three counts of traveling in foreign commerce with intent to engage in a sexual act with a thirteen-year-old

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returned a superseding indictment charging Bredimus with one count of knowingly traveling in foreign commerce for the purpose of engaging in a sexual act with children under 18 years of age in violation of section 2423(b)[2] and one count of traveling in foreign commerce with the intent to promote sexually explicit conduct by minors for the purpose of producing visual depictions of such conduct in violation of 18 U.S.C. §§ 2251 A(b)(2)(A) and (c)(1).[3]

On May 3, 2002, Bredimus moved to dismiss the indictment, asserting an as-applied challenge that (1)

Thai boy in violation of 18 U.S.C. § 2423(b) (Counts One to Three), one count of traveling in foreign commerce with intent to promote child pornography in violation of 18 U.S.C. § 2251A (Count Four), one count of knowingly and willfully using false documents with the knowledge that such documents contained fraudulent statements in violation of 18 U.S.C. § 1001 (Count Five), and one count of knowingly and willfully making false statements to procure a passport with the intent to induce the issuance thereof under the authority of the United States in violation of 18 U.S.C. § 1542 (Count Six).

[2] Pursuant to Section 2423(b), "[A] United States citizen . . . who travels in foreign commerce . . . for the purpose of engaging in any sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of Chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States" is guilty of an offense punishable by fine and/or not more than 15 years imprisonment. 18 U.S.C. § 2423(b).

[3] Pursuant to Section 2251A(b)(2)(A) and (c)(1), "[w]hoever . . . obtains custody or control of a minor . . . with the intent to promote . . . the engaging in of sexually explicit conduct by such minor for the purpose of producing any visual depiction of such conduct," and "in the course of [such conduct] the minor or the actor traveled in or was transported in interstate or foreign commerce" is guilty of an offense punishable by fine and/or not less than 20 years imprisonment or for life. *See* 18 U.S.C. § 2251(A)(b)(2)(A) and (c)(1). For ease of reference, the court will refer to sections 2251A(b)(2)(A) and (c)(1) in this opinion simply as § 2251A.

Congress exceeded its authority under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, by enacting the two statutes under which he was charged, and (2) the district court lacked subject matter jurisdiction over an extraterritorial offense that has no effect within the United States. On July 19, 2002, the district court denied the appellant's Motion to Dismiss, finding *inter alia*, that Section 2423(b) does not exceed Congress's authority under the Commerce Clause because Congress has the authority to keep the channels of foreign commerce free from immoral or injurious uses and that banning foreign travel for an illicit purpose does not impermissibly burden a person's fundamental right to travel. The court also ruled that it had jurisdiction under Section 2423(b) on the grounds that the statute targets an activity that occurs within the United States because the foreign travel originates domestically.

Bredimus entered into a conditional plea agreement with the government on August 27, 2002. Bredimus pled guilty to Count Two of the original indictment, but specifically reserved his right to challenge the constitutionality of Section 2423(b) on appeal.[4] At the arraignment hearing,

[4] Bredimus expressly limited his right to appeal only: (1) any punishment imposed in excess of a statutory maximum; (2) any punishment to the extent it constitutes an upward departure from the guideline range deemed most applicable by the sentencing court; (3) arithmetic errors in the guidelines calculations; (4) any appeal right reserved to the defendant under prevailing Fifth Circuit authority; and (5) any appeal based on the defendant's assertion that Section 2423(b) is unconstitutional.

Bredimus moved the court to reconsider this motion to dismiss, which the district court denied.[5]

On November 18, 2002, the district court sentenced Bredimus to 66 months in the Bureau of Prisons, a fine of $30,000.00, and conditioned supervised release for three years. All remaining counts in the original and superseding indictment were dismissed. Bredimus timely filed a notice of appeal.

II. *STANDARDS OF REVIEW*

This court reviews a constitutional challenge to a federal statute *de novo. United States v. Delgado-Nunez,* 295 F.3d 494, 496 (5th Cir.2002) (quoting *United States v. Brown,* 250 F.3d 907, 912 (5th Cir.2001)). When reviewing an act of Congress passed under the authority of the Commerce Clause, we review the statute under the rational basis standard. *Groome Resources, Ltd. v. Parish of Jefferson,* 234 F.3d 192, 203 (5th Cir.2000). The burden for the challenger is high because "federal commerce legislation continues to merit a high degree of judicial deference." *United States v. Robinson,* 119 F.3d 1205, 1210 (5th Cir.1997). In applying this deferential standard, "[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a *plain showing* that Congress has

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[5] Bredimus's motion to reconsider the motion to dismiss included the arguments that: (1) Section 2423(b) violates his rights under the First Amendment by seeking to regulate mere thought; and (2) Section 2423(b) violates the Privileges and Immunities Clause by impermissibly restricting Bredimus' right to travel. U.S. CONST., amend. I., art. IV, § 2, cl. 1, and amend. XIV, § 1.

exceeded its constitutional bounds." *Groome Resources Ltd., L.L.C. v. Parish of Jefferson,* 234 F.3d 192, 216 (2000).

Challenges to a district court's jurisdiction are reviewed *de novo. United States v. Sims Bros. Const., Inc.,* 277 F.3d 734, 741 (5th Cir.2001).

A trial court cannot accept a plea of guilty unless there is a sufficient factual basis for the plea. *See* Fed.R.Crim.P. 11(f); *United States v. Johnson,* 194 F.3d 657, 659 (5th Cir.1999); *United States v. Gobert,* 139 F.3d 436, 439 (5th Cir.1998). A district court's acceptance of a guilty plea is a factual finding which we review under the clearly erroneous standard. *United States v. Angeles-Mascote,* 206 F.3d 529, 530 (5th Cir.2000).

III. *DISCUSSION*

A. The Constitutionality of Section 2423(b)

Under Section 2423(b), "[a] . . . United States Citizen . . . who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined [and/or] imprisoned. . . ." 18 U.S.C. § 2423(b). Bredimus argues that the statute of conviction, as applied,[6] constitutes Congress exercising a general police power in violation of *United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) and

[6] We limit the scope of our review to consideration of the as-applied challenge to Section 2423(b) asserted by Bredimus. He did not raise, and thus we do not address, whether the aforementioned statute would pass muster under a facial Commerce Clause challenge.

United States v. Morrison, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), and therefore, he contends that this court must inquire into whether the regulated activity "substantially affects" commerce. Specifically, Bredimus challenges the constitutionality of Section 2423(b), on the grounds that Congress exceeded its authority under the Commerce Clause, because on these facts there is no "substantial relationship" between the proscribed conduct (the crime of sexual exploitation of minors) and foreign commerce (travel by U.S. citizens abroad). Bredimus also contends that, as applied in this case, the statute unconstitutionally burdens his individual rights under the First, Fifth, and Eighth Amendments, because it punishes mere thought, mere travel, or mere preparation for a crime. We will discuss each in turn.

1. First Principles

Because Bredimus brings a challenge under *Lopez* and *Morrison,* we begin our analysis by briefly elucidating the "first principles" of commerce clause jurisprudence. *United States v. Ho,* 311 F.3d 589, 596 (5th Cir.2002).[7] The Constitution "ensure[s] protection of our fundamental liberties." *Id.* Pursuant to this aim, the Framers devised a federal government of limited and enumerated powers. This constitutionally mandated division of authority appears in the Article I Vesting Clause, U.S. Const. art. I, § 1, which confers upon Congress solely "the legislative powers

[7] In a previous decision, this court has discussed a more thorough and exhaustive recitation of the history of the Commerce Clause and the earlier landmark cases of *Lopez* and *Morrison* decisions relied upon by the appellant. *See Ho,* 311 F.3d at 596-97.

herein granted." The clause necessarily implies that the Framers denied Congress a "general police power," *Ho,* 311 F.3d at 596 (quoting, *Morrison,* 529 U.S. at 618 and n. 8, 120 S.Ct. 1740), reposing such power instead in the states.

The Constitution, however, expressly granted Congress the power "to regulate Commerce with foreign Nations, and among the several States . . ." Art. I, § 8, cl. 3. Since 1937,[8] the scales of the federal courts' Commerce Clause jurisprudence tipped more towards according to Congress "considerably greater latitude in regulating conduct [including federal criminal statutes]." *See Morrison,* 529 U.S. at 608, 120 S.Ct. 1740, rather than to maintaining a distinction between "what is truly national and what is truly local." *Id.* at 617-18, 120 S.Ct. 1740; *Lopez,* 514 U.S. at 567-68, 115 S.Ct. 1624. A new era emerged with the Court's decisions in *Lopez* and *Morrison,* which clarified the legal standards applicable to a constitutional challenge under the Commerce Clause.[9] Based on those two landmark cases, it is now clear, that while courts still maintain a wide degree of deference to Congress's power to enact legislation pursuant to the Commerce Clause, such

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[8] Beginning in 1937, federal court jurisprudence broadly construed the scope of authority conferred upon Congress by the Commerce Clause. *See NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937) (upholding the National Labor Relations Act); *United States v. Darby,* 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941) (upholding the Fair Labor Standards Act); and *Wickard v. Filburn,* 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942) (upholding the Agricultural Adjustment Act of 1938).

[9] Although the Court has taken steps recently to clarify Commerce Clause jurisprudence, it has emphasized that legal standards under the Commerce Clause "are not precise formulations, and in the nature of things they cannot be." *Lopez,* 514 U.S. at 567, 115 S.Ct. 1624.

power is now subject to certain "outer limits." *Lopez,* 514 U.S. at 556-67, 115 S.Ct. 1624; *see also Ho,* 311 F.3d at 596. With that in mind, we begin our analysis of the current facts.

2. The Commerce Clause

Our consideration of Bredimus's assertion that Congress exceeded the "outer limits" of the Commerce Clause must begin with *Lopez.* In *Lopez,* the plaintiff brought a challenge to the constitutionality of the Gun-Free School Zones Act of 1990, § 922(q)(2)(a); which made it a federal crime to have a gun within 1,000 feet of a school. The *Lopez* Court summarized three broad categories of activity that Congress may properly regulate under its commerce power: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities," and (3) "activities having a substantial relation to interstate commerce, i.e., activities that 'substantially affect' interstate commerce." *Lopez,* 514 U.S. at 558-59, 115 S.Ct. 1624. In *Lopez,* the Court found Section 922(q) unconstitutional because that criminal statute merely regulated firearms near schools, and thus, had no substantial effect on interstate commerce. *Id.* at 561, 115 S.Ct. 1624. Relying upon *Lopez,* Bredimus contends that Congress's regulation of sexual acts with a minor under Section 2423(b) has no substantial effect on interstate commerce. We disagree.

Although this court has not addressed the constitutionality of Section 2423(b) under the Commerce Clause, other circuit courts have. In *United States v. Han,* 230 F.3d 560, 565 (2d Cir.2000), the Second Circuit upheld Section

2423(b)'s constitutionality. The defendant in *Han* was convicted of violating the interstate commerce prong of Section 2423(b) after traveling from New Jersey to New York to engage in sexual acts with an individual he thought to be a thirteen-year-old girl, but who was in fact an undercover police officer. *Id.* at 562. Like Bredimus, the defendant in *Han* relied on the reasoning of *Lopez* and claimed that the statute was invalid because the regulated activity did not "substantially affect" interstate commerce. *Id.* The Second Circuit in *Han* rejected the defendant's claim, distinguishing *Lopez* on the grounds that "*Lopez* dealt exclusively with the third category. . . ." in contrast "[Section] 2423(b) deals with the use of the channels of interstate commerce." *Id.*; *see also United States v. Brockdorff,* 992 F.Supp. 22, 24, n. 3 (D.D.C.1997) (stating that Section 2423(b) presents a "channels of commerce" issue rather than a *Lopez* "affecting commerce" issue). We find no reason to generally disagree with *Han,* and therefore, we reject Bredimus's contention that we should inquire into whether the regulated activity "substantially affects" foreign commerce.

Bredimus argues, in the alternative, that even assuming that Section 2423(b) generally presents a "channels of commerce" issue, a substantial affect analysis may still be appropriate. Essentially, Bredimus argues that the *Lopez* categories should be viewed as fluid rather than "hermetically sealed constructs designed solely for rigid application." *United States v. Schaffner,* 258 F.3d 675, 679 (7th Cir.2001). The Supreme Court and other lower federal courts have found that these three bases of congressional authority are in fact analytically distinct. *United States v. Robertson,* 514 U.S. 669, 115 S.Ct. 1732, 131 L.Ed.2d 714 (1995); *see also United States v. Pappadopoulos,* 64 F.3d

522 (9th Cir.1995); *Brockdorff,* 992 F.Supp. at 24 n. 3. In *Robertson,* the Supreme Court concluded that transporting equipment and workers from out-of-state into Alaska to further an illegal mining operation was interstate commerce activity subject to congressional regulation without regard to the "affecting commerce" test. *Id.* As stated by the Court, "[t]he 'affecting commerce' test was developed in our jurisprudence to define the extent of Congress's power over purely *intra*state commercial activities that nonetheless have substantial *inter*state affects." *Id.* at 671, 115 S.Ct. 1732 (emphasis in original). Furthermore, in *Schaffner,* the Seventh Circuit found that although the "[*Lopez*] categories are useful as a synopsis of the Court's Commerce Clause jurisprudence, the attempt to fit a regulation *within one category* can prove elusive, even fruitless." 258 F.3d at 679 (emphasis added). Interpreted in this light, *Schaffner* highlights the potential for certain cases to fall into several *Lopez* categories rather than focusing, as Bredimus urges us to do, on the lack of distinctiveness of the categories themselves. *Id.* at 679, 115 S.Ct. 1732. Therefore, we reject Bredimus's reading of the *Lopez* categories. Our determination comports with the treatment by other courts of Commerce Clause challenges to statutes analogous to the one at issue today.

This court notes that other circuits have found statutes similar to Section 2423(b) – 18 U.S.C. § 2262(a) and 18 U.S.C. § 2261 – to be valid exercises of Congress's Commerce Clause authority. For example, courts have rejected Commerce Clause challenges to the Violence Against Women Act of 1994, § 2262(a)(1), which criminalizes crossing a state line with the intent to violate a protection order and then violating it, because that statute criminalizes only "those violations of protection orders

that involve the use of interstate commerce." *Han,* 230 F.3d at 563; *See also United States v. Von Foelkel,* 136 F.3d 339, 341 (2d Cir.1998) (upholding § 2262(a)(1) as it falls within Lopez's first category); *United States v. Bailey,* 112 F.3d 758, 766 (4th Cir.), *cert. denied,* 522 U.S. 896, 118 S.Ct. 240, 139 L.Ed.2d 170 (1997); *United States v. Wright,* 128 F.3d 1274, 1276 (8th Cir.1997) (upholding § 2262(a)(1) as it "falls within Congress's authority to keep the channels of interstate commerce free from immoral and injurious uses.") (quotations omitted).

Similarly, courts have upheld, under the Commerce Clause, the constitutionality of 18 U.S.C. § 2261, which provides: "A person who travels across a State line . . . with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished. . . ." *Han,* 230 F.3d at 563; *see also United States v. Gluzman,* 154 F.3d 49, 50 (2d Cir.1998); *United States v. Lankford,* 196 F.3d 563 (5th Cir.1999) (finding that because § 2261(a)(1) is a regulation of the use of channels of interstate commerce, the court "need not address whether domestic violence 'substantially affects' interstate commerce"); *United States v. Page,* 167 F.3d 325, 334 (6th Cir.1999) ("Because the triggering factor of § 2261(a)(2) is the movement of the victim across state lines, this statute falls into the first category and is a valid exercise of Congress's power to regulate the use of the channels of interstate commerce.").

In upholding the constitutionality of Sections 2262(a)(1) and 2261, the previously mentioned cases generally refer to Congress's ability to regulate morality under the Commerce Clause. In *Caminetti v. United States,* the Court

held that the Mann Act, which prohibits the transportation of women in commerce for immoral purposes, was a valid exercise of Congress's commerce power. 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917). In that decision, the Court clearly stated that "to keep the channels of commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question." *Id.* at 491, 37 S.Ct. 192. Pursuant to this aim, the Court has long held that Congress has plenary power to reach and punish the movement in interstate commerce of those who seek to accomplish unlawful purposes:

> We have said that the liberty protected by the Constitution embraces the right to be free in the enjoyment of one's faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood of avocation. . . . But surely it will not be said to be part of any one's liberty . . . to enter into commerce . . . an element that will be confessedly injurious to the public morals.

Lottery Case, 188 U.S. 321, 356-57, 23 S.Ct. 321, 47 L.Ed. 492 (1903).

We acknowledge that unlike Section 2423(b), which criminalizes crossing state (or international) lines with a criminal intent, without requiring the commitment of any further criminal act, the aforementioned statutes, Sections 2262(a)(1) and 2261, require both crossing borders with criminal intent and the commission of an unlawful act thereafter. However, we do not find that distinction dispositive here. Courts have also upheld a murder-for-hire statute, 18 U.S.C. § 1958, which, like Section 2423(b), does not require the commission of a further act. Section 1958

requires only that the government prove the defendant traveled in interstate or foreign commerce with the intent that a murder be committed for hire. *United States v. Delpit,* 94 F.3d 1134, 1149 (8th Cir.1996); *see also United States v. Degan,* 229 F.3d 553, 556 (6th Cir.2000) (rejecting defendant's claim of no nexus between interstate commerce and crime and upholding the constitutionality of Section 2423(b) on the basis of the sufficiency of the evidence). Like Section 2423(b), under section 1958, once the commerce facility has been used with the required intent, the crime is complete. Bredimus points out that these courts did not specifically conduct a Commerce Clause analysis as part of their decision-making process. While acknowledging his argument, we still find the holdings of these cases persuasive, however, because the statute itself was upheld in both instances pursuant to Congress's Commerce Clause authority. *Delpit,* 94 F.3d at 1149; *Degan,* 229 F.3d at 556.

We find no reason to disagree with the aforementioned precedent as applied here. Quite the contrary, we find the deference accorded to Congress under Section 2423(b) even more compelling when, as here, the commerce at issue is foreign, as opposed to interstate. The Supreme Court has long held that Congress's authority to regulate foreign commerce is even broader than its authority to regulate interstate commerce. *Japan Line, Ltd. v. Los Angeles County,* 441 U.S. 434, 448, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979). In comparison with the *Han* court's deference to Congress pursuant to Section 2423(b), under which Congress regulated merely interstate commerce, such deference applies even more forcefully to cases involving foreign commerce travel. Thus, on the facts presented, a court

should allow Congress greater deference in regulating the channels of foreign commerce.[10]

After examining the reasoning and holdings of other cases upholding the constitutionality of Section 2423(b) and similar statutes, the defendant's Commerce Clause challenge should fail.

3. Mere Preparation for an Offense, Mere Thought, or Mere Travel

Bredimus argues that he cannot constitutionally be charged under Section 2423(b) for doing nothing more than traveling to another country with the intent prohibited by that section. He claims that because the statute does not require proof of any additional acts by the defendant, it fails to establish a connection between the defendant's travel and his intent, and therefore punishes "mere thought," "mere travel," and "mere preparation," in violation of his rights under the First, Fifth, and Eight[h] Amendments. We disagree.

In *United States v. Gamache,* 156 F.3d 1, 8 (1st Cir.1998), the First Circuit upheld the constitutionality of Section 2423(b), as applied, even though the defendant argued that the statute penalized him for "mere thought." (finding that the statute punishes acts and not mere

[10] We note that where congressional regulation of foreign commerce is involved, not only is there the necessity that the nation speak with one voice, in matters potentially affecting international relations, but also there is not the counter veiling [sic] concern of a federal invasion of the general police power of the states that is so extensive as to obliterate the distinction between national and local concerns and create a completely centralized government.

abstractions because "the appellant did not merely sit in the quiet of his house, contemplate evil thoughts, and then flip the channels of his television set, and continue blithely with other musings"). The court held that the statute does not punish thought alone, because at least one act must occur: crossing a state line. *Id.* Similarly, in *Han,* the Second Circuit rejected the defendant's First Amendment challenge that Section 2423(b) was unconstitutionally applied to him because it criminalized mere thought. *Han,* 230 F.3d at 563. The Second Circuit in *Han* reasoned that crossing state lines may be "sufficient to elevate [the defendant's] thoughts to an intention to commit the charged act." *Id.*

Consistent with our fellow circuits, therefore, we find that Section 2423(b) does not prohibit mere thought or mere preparation because it requires as an element that the offender actually travel in foreign commerce. As in *Gamache* and *Han,* the substantive criminal act at issue here is not, as Bredimus claims, a sexual act with a juvenile. *See Gamache,* 156 F.3d at 8; *Han,* 230 F.3d at 563. Instead, Section 2423(b) punishes the travel with the intent to commit such an act itself. *Id.* We find Bredimus's travel to a foreign country from a domestic origin sufficient to elevate his thoughts to an intention to commit the charged act. Section 2423(b) does not punish mere thought, because Bredimus admits to the act of crossing a national border. Thus, Bredimus's claim that Section 2423(b) punishes mere thought and lacks a meaningful *actus reas* is invalid.

We also address Bredimus's contention that *Gamache* and *Han* should be distinguished from his case. Bredimus contends that in *Gamache* and *Han* the courts relied heavily on evidence that the defendants before them had

actually engaged in acts beyond mere thought. The defendant in *Gamache* engaged in extensive correspondence that eventually led to his trip, purchased supplies, and transported the supplies in his vehicle. *Gamache,* 156 F.3d at 8. In *Han,* the defendant "engaged in acts beyond mere thinking, evidenced by his telephonic communications in which he developed a plan and articulated a purpose to cross interstate lines to engage in sexual acts." *Han,* 230 F.3d at 563.[11] In this light, Bredimus is correct that the record on appeal does not present any evidence of preparatory acts committed by him prior to his departure from Dallas to the Far East.

Under the circumstances presented in this case, however, we find that evidence of preparatory acts are not required. The need for evidence of preparatory acts is obviated by Bredimus's guilty plea, in which he admits to having formed the intent to engage in illicit sexual acts with a minor prior to traveling in foreign commerce. Admittedly, had Bredimus not pleaded guilty, the lack of preparatory acts would have increased the government's difficulty in proving beyond a reasonable doubt that he

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[11] We also acknowledge that the courts in both *Gamache* and *Han* noted that the issue raised in the case *sub judice* had not yet been decided:

> It is unnecessary to decide here, and thus it is not held, that a mere thought of engaging in a sexual act with [a minor], where coupled with crossing a state line, constitutes a prohibited act, and thus, a violation of § 2423(b). Nor is it held that, if thus construed, § 2423(b) would pass constitutional muster. These questions can be considered when raised where the facts are so limited.

Han, 230 F.3d at 563; *see also Gamache,* 156 F.3d at 8.

had the requisite intent at the time he traveled. Difficulty of proof, however, "is not a valid criteria for determining the constitutionality of the present statute." *Gamache,* 156 F.3d at 8. Thus, because Bredimus pled guilty to the requisite intent under Section 2423(b), and expressly admitted his intent in the factual resume supporting his guilty plea which he and his attorney signed, on these facts, we need not inquire into evidence of preparatory acts. Therefore, we reject Bredimus's claim that Section 2423(b) criminalizes mere thought or mere preparation, and find that the First and Eighth Amendments do not prevent the criminalization of the conduct here.

Bredimus also claims that the right to travel cannot be criminalized merely because the travel is undertaken simultaneously with a defendant intending to commit an offense. He contends that Section 2423(b) is unconstitutional because it imposes a burden on exercising the right to travel by a citizen whose right to travel has not been qualified in any way, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments. We are not persuaded. We agree that the right to travel is a fundamental right[12] and that a government infringement

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[12] We must distinguish between the right to travel generally versus the right to travel in foreign commerce. Although the freedom to travel in foreign commerce is a liberty interest recognized under the Fifth Amendment, *Kent v. Dulles,* 357 U.S. 116, 127, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958) ("Freedom to travel abroad is, indeed, an important aspect of the citizen's liberty"), it clearly is accorded less stature than the right to travel interstate. *Haig v. Agee,* 453 U.S. 280, 306, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981) ("The Court has made it plain that the freedom to travel outside the United States must be distinguished from the right to travel within the United States."). Courts usually grant great deference to restrictions on foreign travel. *Califano v. Aznavorian,* 439 U.S. 170,

(Continued on following page)

on that right will be subject to strict scrutiny. *See Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). While the right to travel is well-established, no federal court has ever held that an individual has a fundamental right to travel for an illicit purpose. *See Hoke v. United States,* 227 U.S. 308, 320-23, 33 S.Ct. 281, 57 L.Ed. 523 (1913); *United States v. Burton,* 475 F.2d 469, 471 (8th Cir.1973). Because this statute, as relevant here, only criminalizes foreign travel when the travel is done with an illicit intent, we find that Section 2423(b) does not impermissibly burden the fundamental right to travel.

The statute of conviction, therefore, is not unconstitutional as applied to Bredimus. Section 2423(b) only prohibits actual travel with an illicit intent, not just the travel itself. For the aforementioned reasons, we find this statute constitutional because it punishes more than mere thought, mere travel, or mere preparation for a crime.

B. Jurisdiction of the District Court

Bredimus submits that the district court lacked jurisdiction to punish him for his extraterritorial actions because those actions lacked a domestic effect. In support of this contention, he relies on *Strassheim v. Daily,* in which a defendant was punished for his extraterritorial acts based on the court's holding that prohibited conduct occurring in one state could be punished in another. 221 U.S. 280, 31 S.Ct. 558, 55 L.Ed. 735 (1911). Bredimus's

177, 99 S.Ct. 471, 58 L.Ed.2d 435 (1978) (stating that legislation infringing on foreign travel was "not to be judged by the same standards applied to laws that penalized the right to interstate travel").

claim, however, is based on the erroneous notion that Section 2423(b) punishes extraterritorial acts. Section 2423(b) contains an explicit jurisdictional element: once a United States citizen has traveled in foreign commerce, a federal court has jurisdiction because the crime is complete once foreign travel occurs with the illicit intent. *Gamache,* 156 F.3d at 8 (stating that the phrase "traveling in interstate commerce" supplies both the jurisdictional basis and the objective act that facilitates the proof of intent). We find therefore, that the criminal act under § 2423(b) is foreign travel with criminal intent; and thus, the offense is complete even if the illicit intent is never realized. *United States v. Hersh,* 297 F.3d 1233, 1245-46 (11th Cir.2002) (stating that a violation of Section 2423(b) does not require that the government prove that the criminal act occurred in a foreign country, merely the defendant "had formed the intent to engage in sexual activity with a minor when he crossed state lines. . . ."). Bredimus's criminal act was not the sexual exploitation of children in Thailand, but rather the foreign travel with an illicit intent. Therefore, the district court correctly asserted jurisdiction, because the prohibited conduct in this case occurred within the United States.

C. Sufficiency of the Factual Basis

Bredimus claims that, based on his previous arguments, the factual basis for his plea is insufficient. He contends that if Section 2423(b) is unconstitutional because Congress lacked the authority to enact it under the Commerce Clause, or the district court lacked jurisdiction because the offense had no domestic effect, then a sufficient factual basis for his guilty plea was lacking as a matter of law. Because those claims were previously addressed and

dismissed, we find no merit in, and thus, we decline to address, the appellant's challenge to the sufficiency of the factual basis.

IV. *CONCLUSION*

For the foregoing reasons, we AFFIRM Bredimus's conviction and sentence in all respects.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-11307

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

NICHOLAS BREDIMUS

Defendant-Appellant

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Filed Jan. 7, 2004)

(Opinion 11/26/03, 5 Cir., ___, ___ F.3d ___)

Before GARWOOD, JONES, and STEWART, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carl E. Stewart
United States Circuit Judge

REHG-4A

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41
FOR STAY OF THE MANDATE.